UNITED
NATIONS

S

Security Council

Distr.
GENERAL

S/23734
19 March 1992

ORIGINAL: ENGLISH

LETTER DATED 11 MARCH 1992 FROM THE PRESIDENT OF THE GOVERNING COUNCIL OF THE UNITED NATIONS COMPENSATION COMMISSION ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

I have the honour to transmit herewith, for the attention of the Security Council, the following information on the fourth session of the Governing Council of the United Nations Compensation Commission.

The Governing Council resumed its fourth session on 6 March 1992, to complete the discussion on "Compensation for Business Losses", on the basis of a working paper prepared by the Secretariat (S/AC.26/1992/WP.21).

The Governing Council decided to approve the propositions and conclusions on compensation for business losses contained in document S/AC.26/1992/9, enclosed (see annex). The fourth session of the Governing Council was then closed.

(Signed) Alex REYN
President of the Governing Council

92-13008 3050i (E) 200392 *220392*

/...

Annex

Decision taken by the Governing Council of the United Nations Compensation Commission during its resumed Fourth Session, at the 23rd meeting, held on 6th March 1992 *

Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation

1. The propositions and conclusions contained in this Decision shall apply to compensation for the loss of earnings or profits and other business losses covered by Security Council resolution 687 (1991).

2. The basic premise underlying all of the findings concerning business losses is that, pursuant to paragraph 16 of Security Council resolution 687 (1991), Iraq "is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of Iraq's unlawful invasion and occupation of Kuwait".

3. This Decision does not attempt to describe all of the conceivable factual and legal situations resulting from Iraq's invasion and occupation of Kuwait. Bearing in mind Security Council resolution 687 (1991), other types of losses may have been suffered, and they are eligible for compensation if they result from Iraq's invasion and occupation of Kuwait. Ultimately, it will be up to the Commissioners to identify the applicable principles and apply them to the circumstances of particular cases.

---

* Previously issued under the symbol S/AC.26/1992/9 of 6 March 1992.

4. The propositions and conclusions contained in this Decision are not intended to be a comprehensive statement of relevant principles. The Governing Council will review the matter and will provide further guidance concerning business losses as required in the future. In particular, the Governing Council will request the Secretariat to consider the question of steps which might be taken to protect against multiple recovery of compensation by claimants, or to confirm that claimants have attempted to avail themselves of particular possible sources of recovery, as a prerequisite to relief from the Commission.

5. When reference is made herein to corporations and other legal entities, it is understood that such corporations or other legal entities may be either publicly or privately owned enterprises.

6. The trade embargo and related measures*, and the economic situation caused thereby, will not be accepted as the basis for compensation. Compensation will be provided to the extent that Iraq's unlawful invasion and occupation of Kuwait constituted a cause of direct loss, damage or injury which is separate and distinct from the trade embargo and related measures. (Where, for example, the full extent of the loss, damage or injury arose as a direct result of Iraq's unlawful invasion and occupation of Kuwait, it should be compensated notwithstanding the fact that it may also be attributable to the trade embargo and related measures). The total amount of compensable losses will be reduced to the extent that those losses could reasonably have been avoided. Further guidance on the matters dealt with in this paragraph will be provided by the Governing Council for the use of the Commissioners when assessing claims.

---

* The trade embargo and related measures refers to the prohibitions in United Nations Security Council Resolution 661 (1990) and relevant subsequent resolutions and the measures taken by states pursuant thereto.

I. LOSSES IN CONNECTION WITH CONTRACTS OR PAST BUSINESS PRACTICE

A) Contracts

7. The following general conclusions apply with regard to Iraq's liability for contract losses.

Contracts with Iraq

8. Where Iraq itself was a contracting party and breached its contractual obligations, Iraq is liable under general contract law to compensate for all actual losses suffered by the other contracting party, including, inter alia, losses relating to specially manufactured goods. Future lost profits may be compensable in such a case if they can be calculated under the contract with reasonable certainty. An alternative measure of damages may apply where a governing contract specifically provides for a particular measure, except that the amount of compensation provided should not exceed the loss actually suffered. Breaches of contract not resulting from the invasion and occupation of Kuwait are not within the jurisdiction of the Commission.

9. Where Iraq did not breach a contract to which it was a party, but continuation of the contract became impossible for the other party as a result of Iraq's invasion and occupation of Kuwait, Iraq is liable for any direct loss the other party suffered as a result, including lost profits. In such a situation, Iraq should not be allowed to invoke *force majeure* or similar contract provisions, or general principles of contract excuse, to avoid its liability.

Contracts where Iraq is not a party

10. Where losses have been suffered in connection with contracts to which Iraq was not a party, the following conclusions apply. Iraq is responsible for the losses that have resulted from the invasion and occupation of Kuwait. A relevant consideration may be whether the contracting parties could resume the contract after the lifting of the embargo against Kuwait, and whether they have in fact resumed the contract. Iraq principally cannot be relieved from its responsibility by *force majeure* provisions of contracts to which it is not a party or contract excuse rules of other applicable laws.

B) Past business practice

11. Where a loss has been suffered relating to a transaction that has been part of a business practice or course of dealing, Iraq is liable according to the principles that apply to contract losses. No liability exists for losses related to transactions that were only expected to take place based on a previous course of dealing.

II. LOSSES RELATING TO TANGIBLE ASSETS

12. Where direct losses were suffered as a result of Iraq's invasion and occupation of Kuwait with respect to tangible assets, Iraq is liable for compensation. Typical actions of this kind would have been expropriation, removal, theft or destruction of particular items of property by Iraqi authorities. Whether the taking of property was lawful or not is not relevant for Iraq's liability if it did not provide for compensation.

13. In a case where business property had been lost because it had been left unguarded by company personnel departing due to the situation in Iraq and Kuwait, such loss may be considered as resulting directly from the invasion and occupation.

14. On the other hand, losses that occurred because company personnel was detained by Iraqi authorities, must clearly be considered a direct result. In this context, it is relevant to note the Hague Regulations on Land Warfare annexed to Conventions II of 1899 and IV of 1907 respecting the Laws and Customs of War on Land, which require that an occupying power has to restore and to ensure public order and safety as far as possible (Hague Regulations, Article 43).

15. Depending on the type of asset and the circumstances of the case, one of several valuation methods may be used. Methods typically used to value tangible assets are book value and replacement value. *Book value* is considered to mean value at which an asset is carried on a balance sheet. Book value at any time is cost of an item minus accumulated depreciation. *Replacement value* is considered to mean the amount required to obtain an asset of the same kind and status as the asset damaged or lost. Replacement value would not normally allow for replacement of an old item with a new one.

III. LOSSES RELATING TO INCOME-PRODUCING PROPERTIES

16. The following general conclusions apply with regard to losses suffered as a result of Iraq's invasion and occupation of Kuwait in connection with income-producing properties. These include various kinds or businesses whose value is determined not only by the value of their individual assets but also by the greater value they possess due to their capacity to generate income. The conclusions are based on the premise that the business affected was a going concern, i.e. it had the capacity to continue to operate and generate income in the future.

17. In principle, Iraq is liable to compensate for the loss of a business or commercial entity as a whole resulting from Iraq's invasion and occupation of Kuwait. In the event that the business has been rebuilt and resumed, or that it could reasonably have been expected that the business could have been rebuilt and resumed, compensation may only be claimed for the loss suffered during the relevant period.

18. For the valuation of income-producing properties there are several alternative concepts. One is to measure by reference to costs, which leads to the determination of book value. Another is to determine the value of the property as a going concern. This is often done by reference to the market value of similar properties. Where such market value cannot be ascertained, the economic or current value of that asset can be ascertained by the *discounted cash flow (DCF)* method or by the *price/earnings (P/E)* method. The DCF method calculates the value at one specified time of cash flows that are to be received at a different time by discounting the yearly net cash flows to present value, with the discount rate including cost of capital and risk components. The price/earnings method takes as a basis past periods' business results and then capitalises them by the application of a multiple (P/E ratio) which reflects expectations about future performance and growth, or lack of it.

19. In principle, the economic value of a business may include loss of future earnings and profits where they can be ascertained with reasonable certainty. In the case of the loss of businesses and their earning capacity resulting from the invasion and occupation of Kuwait, it can be expected that a number of such businesses can be or could have been rebuilt and resumed. The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future. Compensation should be provided if the loss can be ascertained with reasonable certainty based on prior earnings or profits. For example, the loss of any earnings or profits during the relevant time period could be calculated by a multiple of past earnings and profits corresponding to that time period.